IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

TUESDAY, THE 21ST NOVEMBER 2006 / 30TH KARTHIKA 1928

Crl.MC.No. 4784 of 2003()

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ST.858/2003 of JUDL.MAGISTRATE OF FIRST CLASS-I, KOTTARAKKARA

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PETITIONER: 2ND ACCUSED:

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N.DAMODARAN,
PROPRIETOR, KRISHNA CASHEW CO., KOLLANOOR,
EZHUKONE, KOLLAM.

BY ADV. SRI.M.K.CHANDRA MOHANDAS

RESPONDENTS:

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1. ENFORCEMENT OFFICER,
EMPLOYEES' PROVIDENT FUNDS, DISTRICT OFFICE,
HOSPITAL ROAD, KOLLAM.

2. SHRI SHERIFF REHUMAN,
PROPRIETOR, K.M.K. CASHEW COMPANY, PUTHENPURA,
EZHUKONE P.O., KOTTARAKKARA.

BY ADV. SRI.N.N. SUGUNAPALAN, SC, P.F.
SRI. GIKKU JACOB, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 21/11/2006, ALONG WITH CRMC NOS.4995, 4996, 5144, 5147 & 5149 OF 2003, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**K.R. UDAYABHANU, J.**

**CRL.M.C.NOS,4784, 4995,4996,5144,5147 & 5149 OF 2003**

**DATED THIS THE 21ST DAY OF NOVEMBER 2006**

**ORDER**

The petitioner against whom prosecutions have been launched under Section 14(1A) of the Employees Provident Fund and Miscellaneous Provisions Act 1952 vide S.T.Nos.858/2003, 906/2003, 859/2003, 907/2003, 904/2003 and 905/2003 in the file of the Judicial First Class Magistrate Court-I, Kottarakkara, has sought for setting aside the above proceedings contending that he is not liable for the remittance of the P.F. contributions of the employees of the particular factory that he has leased out to the second respondent from 15-9-2000 onwards. According to the petitioner, he is aged about 80 years and bed ridden and yet he is being prosecuted. It is pointed out that as per the prosecution, the proceedings are initiated with respect to the period subsequent to 15-9-2000 and as per condition No.3 in the agreement the obligation to pay provident fund, E.S.I., Welfare Fund etc. is with the lessee. It is pointed out that the assessment as per Section 7(A) of the Provident Fund Act and

enquiry under Section 7(A)(2)were held without notice to the petitioner and the assessment order is against the second respondent. The cashew factory is run in the name of KMK Cashew company by the second respondent. The second respondent has got sufficient amount in his account and has got movable and immovable properties from which the amount can be realised. The petitioner has issued detailed letters in this regard vide Annexures-VIII & IX to the department intimating the above details.

2. Counsel for both sides were heard.

3. Annexure-I is the licence issued to the petitioner with respect to the factory by name Krishna Cashew Company which was earlier owned by another person and subsequently as mentioned by the petitioner since 1989, the same has been out of different persons periodically. The names of the above lessees and changed the name of the factory under different lessees is also mentioned in Annexure-I. The licence has been renewed periodically. Annexure-II is a lease deed extended on 15-9-2000 wherein as per Clause 3, the liability to remit provident fund

contribution etc.are the responsibility of the lessee and as per Clause 4, the lessee is not to appoint fresh employees without the consent of the lessor. Annexure-III is the lease deed dated 18-12-2001. Annexure-IV is the prosecution notice to the second respondent, the present lessee and Annexure-V is the assessment order against the second respondent under Section 7A and the direction to the second respondent to remit the amount due which has been specified therein. Annexure-VI is the details of the licence after the factory has been leased out to the second respondent. The transfer of the factory is acknowledged vide Annexure-VI official document. Annexures VII,VIII and IX are the copies of the letters issued by the petitioner to the assessment authority explaining the details of his non-liability to remit the contributions. Annexure-XI is the sanction order authorizing prosecution against the petitioner and the second respondent.

4. In the statement filed by the first respondent/Enforcement Officer in Crl.M.C.No.4995/2003, the contention is that with respect to enquiry under Section 7A

summons was issued to both the petitioner and the second respondent being the lessor and the lessee. The same was acknowledged but the petitioner kept away from the enquiry. It is also pointed out that the copy of the assessment order has been issued to both the petitioner and the second respondent. Under Section 17B of the Act , the the transferor as well as the transferee are jointly and severally be liable to pay the employees provident fund contribution and other dues. It is pointed out that it is the factory that is covered by the statute and not the owner or the lessee. According to the first respondent, it is the duty of the owner to see that employees provident fund contributions are paid. It is also pointed out that as per Clause-4 of the lease agreement, without the consent of the petitioner no new employees can be appointed nor can the existing employees be terminated which would indicate that the petitioner is having the ultimate control and the definition of the employer in Section 2(e) is also relied on.

5. I find that the facts alleged as to the lease and the fact that it is the lessee who is running the factory since the date of

the lease and that the assessment order was passed against the second respondent and not against the petitioner and that it is the second respondent who has been directed to remit the provident fund contributions and that the petitioner as per letters addressed to the first respondent has intimated that the second respondent is having sufficient amounts in his N.R.I. Account No.1406 and assets, buildings and land in Survey No.17/4 stands undisputed. I find that Section 17 B of the Act only provides that the transferor as well as the transferee are jointly and severally liable to pay the contribution etc.from the employer in respect of the period upto the date of such transfer. The proviso to the Section further stipulates that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer. I find that the intent of Section 17B is unequivocal. So far as the liabilities of the lessor and lessee are concerned, Section 17-B is in fact with respect to the liability of the transferee that he cannot disown the existing liability upto the date of transfer. Evidently the dues are with respect to the period subsequent to the date of transfer. It is also seen that the

assessment order, i.e.Annexure-V is against the respondent lessee. Hence, I find that the prosecution of the lessor for the dues of the lessee cannot be justified and is not permitted vide the statutory provisions. The definition clause of the employer, i.e.Section 2(e) has to be restricted to the context. Of course, the assets of the factory, it appears would be liable for the existing dues. But Section 17B did not envisage the present situation.

In the circumstances, the proceedings pending in the court of the Judicial First Class Magistrate-I, Kottarakkara, i.e.S.T . Nos.858/2003, 906/2003, 859/2003, 907/2003, 904/2003 and 905/2003 are herewith quashed. The Crl.M.Cs.are allowed.

**K.R.UDAYABHANU, JUDGE**

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